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4 UNITED STATES DISTRICT COURT
5 DISTRICT OF NEVADA

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7 UNITED STATES OF AMERICA,

Case No. 2:15-cr-00114-APG-PAL

8 Plaintiff,

9 v.

REPORT OF FINDINGS AND
RECOMMENDATION

10 JESUS ANTONIO DIAZ-FLORES,

(Mot. Suppress – Dkt. #17)

11 Defendant.

12 Before the court is Defendant's Motion to Suppress Evidence for Fourth Amendment
13 Violations (Dkt. #17) which was referred to the undersigned for a Report of Findings of
14 Recommendations pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB1-4. The court has
15 considered the Motion, the United States' Opposition (Dkt. #19), and evidence adduced at an
16 evidentiary hearing held on August 4, 2015. Monique Kirtley appeared on behalf of the
17 Defendant and Susan Cushman appeared on behalf of the Government.

18 The government called the two Nevada Highway Patrol ("NHP") officers who initiated
19 the traffic stop involved in this case, and was prepared to call the K-9 unit officer who deployed
20 the drug sniffing dog. However, counsel for Defendant indicated that she had just received the
21 K-9 training and certification documents from a subpoena duces tecum served on NHP and had
22 not had an adequate opportunity to review them. She requested a two-week continuance for this
23 purpose. The court left the evidentiary hearing open and set the matter for a status check on
24 August 20, 2015. At the status hearing, counsel for Diaz-Flores advised the court that she was
25 withdrawing that portion of her motion seeking an evidentiary to test the reliability of the dog.
26 The government rested and Defendant rested. Diaz-Flores was canvassed and acknowledged he
27 understood he had the right to testify or not and had decided not to testify after conferring with
28 counsel.

BACKGROUND

Jesus Antonio Diaz-Flores ("Diaz-Flores") is charged in an Indictment (Dkt. #8) returned April 21, 2015, with conspiracy to distribute a controlled substance in violation of 28 U.S.C. §§ 846 and 841(a)(1) and (b)(1)(A)(i) and possession with intent to distribute a controlled substance in violation of 28 U.S.C. §§ 841(a)(1) and (b)(1)(A)(i). The indictment arises out of a traffic stop conducted April 8, 2015 at 17:17 on Interstate 15 by two Nevada Highway Patrol Officers who are members of the Southern Nevada Interdiction Task Force. Diaz-Flores was pulled over for following too close to a semi-tractor trailer in violation of Nevada Revised Statute ("NRS") § 484B.127. He produced a Mexican passport and driver's license and eventually retrieved paperwork for the car. Diaz-Flores was detained at the scene while Trooper Mermini conducted a records check which revealed the license plate did not match the vehicle.

The entire encounter was recorded on Trooper Mermini's vehicle recording equipment, although Trooper Mermini's body microphone was turned off during portions of the encounter. A copy of the recording was manually filed and attached to the Motion. Trooper Mermini used a cell phone to call Las Vegas Metropolitan Police Department ("LVMPD") Detective Frampton and requested that he and his narcotics detector dog respond to the scene. Detective Frampton arrived at 17:26. Trooper Mermini gave Diaz-Flores a verbal warning for the traffic violation at 17:38 and returned the paperwork for the car and driver's license to him, telling him he was free to go. As Diaz-Flores prepared to walk back to his car, Trooper Mermini asked him if there were any guns, bombs, or drugs in the car. Diaz-Flores denied that there were. Trooper Mermini asked for permission to search Diaz-Flores' car. Diaz-Flores agreed and signed a written consent to search. He signed it at 17:39, 22 minutes after the traffic stop. Diaz-Flores was asked to stand about 20 feet away from the car while Detective Frampton deployed his dog, Mato.

The dog alerted to the back seat under a cargo area at 17:43. Detective Frampton removed a black suitcase, small beanbag chair, and a 3-inch diameter black PVC pipe from the cargo area. The PVC pipe was capped at one end and had duct taped bundles stuffed inside, greased to fit the pipe. Mermini removed four duct taped bundles from the pipe and another

1 silver duct taped package from inside the beanbag chair. The contents of the packages field
2 tested positive for heroin and Diaz-Flores was placed under arrest at 17:48.

3 In the current Motion, Diaz-Flores seeks to suppress evidence recovered from the stop
4 arguing the traffic stop was conducted without probable cause. The motion claims that Diaz-
5 Flores denies that he was travelling approximately 70 mph or that he was following too close to
6 the semi in front of him. NRS 484B.127 prohibits a driver of a vehicle from following another
7 vehicle "more closely than is reasonable and prudent, having due regard for the speed of such
8 vehicles and the traffic upon and the condition of the highway." Video from the dash cam and
9 Trooper Mermini's vehicle shows that Diaz-Flores was following the semi in a reasonable and
10 safe manner.

11 Diaz-Flores also argues that the stop was unreasonably prolonged, and took longer than
12 necessary to effectuate its initial purpose. Trooper Mermini lacked reasonable suspicion to
13 believe Diaz-Flores was engaged in criminal activity. He delayed returning Diaz-Flores'
14 paperwork and license to him until after Detective Frampton and the canine arrived at the scene.
15 Trooper Mermini also asked Diaz-Flores questions not related to the stop. Diaz-Flores asserts
16 that his consent to search was a result of coercion and duress and tainted by the long detention at
17 the scene. The motion emphasizes that the consent to search form was signed in English and
18 Diaz-Flores is not a native English speaker. Finally, Diaz-Flores argues although a dog sniff
19 alone can supply probable cause to search, the Supreme Court recently stressed that a person
20 accused of having illegal drugs based on a dog's alert must have an opportunity in court to
21 challenge the dependability of the training evidence, and test whether the police handler may
22 have "cued" the dog to make an alert. He initially sought an evidentiary hearing for this purpose,
23 but after receiving documents he subpoenaed, withdrew that portion of his motion.

24 The Government opposes the motion arguing the stop was supported by probable cause
25 to believe a traffic violation had occurred, the length and scope of the traffic investigation was
26 lawful, any prolonged detention was supported by Trooper Mermini's reasonable suspicion that
27 Diaz-Flores was engaged in illegal activity, Diaz-Flores voluntarily consented to a search of his
28 car, and the canine alert provided probable cause to search the car.

EVIDENTIARY HEARING TESTIMONY**I. Testimony of Trooper Al Mermini**

Trooper Mermini testified that he has been employed by the Nevada Highway Patrol for almost five years, and is assigned to the Southern Nevada Interdiction Task Force ("SNITF"). On April 8, 2015 he was working with Sargent Anthony Munoz on patrol on Interstate 15. He and Munoz were parked along the Interstate facing eastbound at mile marker 56 when he observed a black Chevy with South Carolina plates pass. The vehicle was in the number two lane. It was dusty and dirty and the driver had his hands in the "ten-two" position and pushed himself behind the "B port" (phonetic) as he passed the patrol car. As the vehicle passed, Mermini also observed it had many fingerprints on the rear cargo latch indicating to him that numerous trips had been made to the rear cargo area. The car "piqued" his interest and he decided to follow it. While following the vehicle he observed the car following a large semi-truck in the number two travel lane at an unsafe distance. The black Chevy was not going around the semi, like most people would do, although there was a passing lane and there was no traffic preventing him from doing so. Mermini believed the Chevy was travelling so closely to the semi that it was in the semi's blind spot, and therefore following at an unreasonable and unsafe distance. The black Chevy was travelling approximately 70 mph in a 75 mph speed zone.

Trooper Mermini followed the vehicle for approximately 4 miles until pulling him over at mile marker 60 which is an area he frequently uses because he considers it safer for traffic stops. The dash cam on the patrol vehicle was activated 30 seconds prior to activation of the patrol vehicle's lights and sirens.

He parked behind the black Chevy and approached the driver on the passenger's side. Sargent Munoz stood behind him. Mermini asked the driver for driver's license, registration and insurance. The driver spoke to him in English and appeared to understand English. The driver did not have a U.S. driver's license but did have a Mexican passport and Mexican driver's license. Mermini identified the driver of the car as the Defendant, Diaz-Flores.

Diaz-Flores said that he did not have insurance or registration for the vehicle. He initially claimed he had no paperwork for the car, and said it belonged to a friend. When asked

1 the name of the friend he could not provide a name after a long delay. Diaz-Flores later said he
2 had recently bought the car. This made Trooper Mermini suspicious the car might be stolen.
3 The vehicle had a single key and multiple cell phones in the interior of the vehicle. Diaz-Flores
4 was nervous and fidgeting and, when asked why he was so nervous, claimed it was because he
5 had a fight with his wife. Mermini saw he was on the phone and saw another cell phone in the
6 car. Mermini asked Diaz-Flores where he was coming from and going to and Diaz-Flores
7 responded he was coming from Amargosa and returning Amargosa and then stated he was going
8 to South Carolina.

9 Mermini asked Diaz-Flores to step out of the car. Diaz-Flores said paperwork for the
10 vehicle was in the back cargo area. Diaz-Flores left the driver's side door open as he left,
11 exposing it to traffic, indicating to Mermini that he was nervous. Mermini told him to shut the
12 door so the door did not get ripped off and Diaz-Flores retrieved the paperwork from the cargo
13 area of the vehicle. Mermini identified Exhibits 3A through 3E as photocopies of the paperwork
14 Diaz-Flores gave him which were marked and admitted into evidence. The passport and
15 Mexican Driver's License that Diaz-Flores provided had his name on them, however, paperwork
16 for the car did not indicate that he was the owner.

17 Mermini went to the patrol car to begin his investigation. He asked Diaz-Flores to
18 stand at the right front of the patrol car and said that he needed the paperwork for the vehicle.
19 Mermini made a phone call to another Task Force member, Detective Jake Frampton with the
20 Henderson Police Department, in the K-9 Unit at 17:22 and asked him to head to the scene as
21 Mermini felt the totality of the circumstances warranted it. Mermini muted his body microphone
22 while communicating with Detective Frampton. After that he spoke with a law enforcement data
23 base after looking closer at the paperwork Diaz-Flores provided. Mermini put his body
24 microphone audio back on at approximately 17:23. He asked Diaz-Flores, who was standing in
25 front of the open door of the patrol car with Sargent Munoz, who owned the car. Diaz-Flores
26 said the dealer owned the car. Mermini called Detective Sandoval, a LVMPD Task Force
27 member, telling him where he was and said "Sandoval, I've got a case."
28

1 Mermini called the El Paso Intelligence Center ("EPIC") and learned that Diaz-Flores
2 had been previously deported in 2013. He also learned that the license plate on the black Chevy
3 did not belong to the car. In the meantime, Diaz-Flores had spoken with Sargent Munoz and told
4 Munoz that the plates on the car belonged to Diaz-Flores' 1978 Camaro. Diaz-Flores told
5 Munoz who told Mermini that he had placed the license plates from his Camaro on the vehicle
6 because the Chevy was not registered.

7 Detective Frampton arrived at approximately 17:27. Mermini spoke with Frampton
8 while his body microphone audio was off about how he planned on proceeding. Detective
9 Frampton's dog, Mato, was still in the cage of Detective Frampton's vehicle.

10 At 17:38 after receiving the report from EPIC, Mermini told Diaz-Flores that he
11 would be given a warning instead of a ticket and returned his paperwork to him. As Diaz-Flores
12 started to leave, Mermini asked whether Diaz-Flores had any guns, bombs, explosives or
13 narcotics in the car. Diaz-Flores denied contraband was in the car. Mermini observed he was
14 violently trembling. Mermini asked Diaz-Flores if it was okay to search the vehicle. Diaz-
15 Flores verbally agreed and was handed an already filled out NHP written consent to search form.
16 Mermini asked Diaz-Flores to read each line of the form to him out loud. When Diaz-Flores did
17 not do so, Mermini read the form verbatim to him. A copy of the written consent form was
18 marked and admitted as Exhibit 4. Mermini testified that he spoke with Diaz-Flores in English
19 the entire time, and had no problem communicating with him. Diaz-Flores also spoke with
20 Sargent Munoz in English. Diaz-Flores indicated he understood the form. However, he did ask
21 about the request to search "luggage". Mermini told him "luggage" meant "baggage". Mermini
22 asked Diaz-Flores if he understood. Diaz-Flores said he did. Mermini told Diaz-Flores to sign if
23 he consented to search, and the form was signed at approximately 17:39.

24 Mermini and Munoz cleared the car to make sure there were no objects that would
25 hurt the canine. The canine conducted the search and alerted. 6.2 pounds of heroin were
26 recovered from a black PVC pipe in the rear cargo behind the suitcase and in a beanbag-type
27 chair which tested positive for heroin.
28

1 On cross-examination Mermini testified that the video of the stop starts at 17:16:24
2 and Diaz-Flores was pulled over at 17:17:05 at mile marker 60. Mermini called the stop out to
3 dispatch and called in the plates. The purpose of providing the plate number of the vehicle he
4 was stopping to dispatch was so that if anything happened during the traffic stop, other officers
5 would know where he was. He was not asking dispatch to run a records check on the license
6 plates. Mermini testified he told Diaz-Flores he had been stopped for following too close and
7 then asked for driver's license and registration. Diaz-Flores was very cooperative and responsive
8 to questions. Mermini was asked about the reasons he stopped the Chevy. He testified he
9 stopped the vehicle because the car was dirty and dusty indicating it had travelled some distance.
10 He acknowledged it was in the desert and this was not unusual in and of itself. It is also not
11 suspicious in and of itself for fingerprints to be on the cargo area of a vehicle. With respect to
12 Diaz-Flores pushing back behind the "B port" as the car passed the patrol car, Mermini
13 acknowledged that someone could have straightened and then pushed back to stretch. Following
14 too close is a violation for NRS 484B.127. He estimated that Diaz-Flores was following
15 approximately two car lengths behind the semi which was too close, based on his training and
16 experience to be reasonable and prudent travelling 70 mph.

17 Diaz-Flores was nervous. When asked why he was so nervous Diaz-Flores responded
18 that he was in an argument with his wife. Mermini saw Diaz-Flores on the phone and asked him
19 to call his wife back. Diaz-Flores eventually provided a bill of sale for the vehicle. Mermini had
20 Diaz-Flores stand at the front of the patrol car while he made his phone call to Detective
21 Frampton, turning his body microphone off.

22 Mermini remained in his patrol car while he called Detective Frampton and the EPIC
23 records check center. From reviewing the video he agreed that he filled out the consent to search
24 form between 17:25:38 to approximately 17:26:49. It took some time to get the results of his
25 records request from EPIC. When Mermini finally received the information from EPIC he got
26 out of the car at 17:38:32 and handed Diaz-Flores his paperwork telling him he would receive a
27 warning instead of a ticket. Mermini asked questions about drugs in the vehicle after the
28 conclusion of the traffic stop.

1 EPIC gave Mermini information about Diaz-Flores' border crossing and that the vehicle
2 was "cold-plated", meaning it belonged to a 1978 Camaro, not the black Chevy. EPIC also
3 advised Mermini that the black Chevy was not stolen.

4 II. Testimony of Anthony Munoz

5 Munoz has been an NHP officer for ten years and a Sargent for approximately 4 ½ years.
6 He has been Mermini's supervisor for approximately five months and is also assigned to the
7 Task Force. On April 8, 2015 he was riding with Mermini. At the time, Munoz was new to the
8 Task Force and wanted to get to know everyone. He acted as Mermini's cover officer during the
9 stop. Munoz spoke with Diaz-Flores off microphone in English. The patrol car was only
10 equipped with one body microphone worn on Mermini's lapel.

11 Munoz generally discussed Diaz-Flores' travel plans, where he was coming from and
12 going to. Diaz-Flores told him he was going to South Carolina after visiting Amargosa where
13 his sister lived. He intended to sell the vehicle to his sister who decided she did not want to buy
14 it and was going back to South Carolina. Diaz-Flores told Munoz that he did upholstery work in
15 South Carolina. The two engaged in small talk. Diaz-Flores also told Munoz that the plates on
16 the Chevy belonged to his Camaro and that he had put the plates on the Chevy because it was not
17 registered. Munoz checked the VIN on the car, according to the dash cam video, at 17:30:33.

18 Once the consent to search was signed Munoz stayed with Diaz-Flores in the desert while
19 the car was searched. During this time the conversation was minimal. Munoz recalled that Diaz-
20 Flores turned, put his head down, and slumped after the consent was given. At no point did
21 Diaz-Flores revoke consent. All of his conversations with Diaz-Flores were in English and
22 Munoz had no issues at all communicating with him.

23 On cross-examination, Munoz testified that Diaz-Flores cooperated throughout the
24 encounter. The officers had no information that there were any outstanding warrants for Diaz-
25 Flores, or a report that the vehicle was stolen.

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DISCUSSION

I. The Traffic Stop

A temporary detention of and individual during a traffic stop constitutes a seizure within the meaning of the Fourth Amendment. *Whren v. United States*, 517 U.S. 806, 809–10 (1996). The Fourth Amendment requires reasonable suspicion to justify a traffic stop. *United States v. Lopez-Soto*, 205 F.3d 1101, 1104 (9th Cir. 2000). Reasonable suspicion is defined as “a particularized and objective basis for suspecting the particular person stopped of criminal activity.” *United States v. Cortez*, 449 U.S. 411, 417-418 (1981). The reasonable suspicion standard takes into account “the totality of the circumstances—the whole picture.” *Id.*, at 417. This standard requires “considerably less than proof of wrongdoing by a preponderance of the evidence,” and “obviously less” than is necessary for probable cause. *United States v. Sokolow*, 490 U.S. 1, 7 (1989).

As long as there is an objectively reasonable basis to perform a traffic stop, the stop will be permitted by the Fourth Amendment. *Whren* at 813. A traffic violation is sufficient to justify an investigatory stop, even if the violation was merely pretextual, *Id.*, at 811-12, the stop departed from the regular practice of a particular precinct, *Id.* at 814-15, or the violation was common and insignificant, *Id.*, at 18-19. If police have reasonable suspicion to believe a violation of a traffic code has occurred, the stop is reasonable under the Fourth Amendment and evidence recovered from a stop is admissible. *United States v. Choudhry*, 461 F.3d. 1097, 1102 (9th Cir. 2006).

The court finds that the traffic stop in this case complied with the Fourth Amendment because, under the totality of the circumstances, the officers had at least reasonable suspicion that Diaz-Flores was following the semi-truck in front of him more closely than was reasonable and prudent, having due regard for the speed of the vehicles and the traffic on I-15 at the time of the stop. The officers’ testimony and the dash-cam video confirm that Diaz-Flores was following the semi-truck less than two car lengths behind in the number two travel lane. Mermini testified that he followed Diaz-Flores for approximately four miles before pulling him over at a safer section of the highway at mile marker 60. Diaz-Flores was traveling 70 mph.

1 Based on Mermini's training and experience, Diaz-Flores was following so close he was in the
 2 driver's blind spot. Additionally, most drivers would pass a semi-truck in a 75 mph zone rather
 3 than follow so closely behind. There was a passing lane available and no traffic was preventing
 4 Diaz-Flores from passing the semi-truck. Under these circumstances, the officers had reasonable
 5 suspicion that Diaz-Flores was violating NRS 484B.127 which prohibits a driver of a vehicle
 6 from following another vehicle "more closely than is reasonable and prudent, having due regard
 7 for the speed of such vehicles and the traffic upon, and the condition of, the highway."

8 **II. Duration and Scope of the Traffic Stop**

9 The Supreme Court has held that police contact during an investigatory detention must be
 10 reasonably related to the circumstances that initially justified the detention. *United States v.*
 11 *Sharpe*, 470 U.S. 675, 682 (1985). An investigative detention must be tailored to its underlying
 12 justification and may last no longer than necessary to effectuate the purpose of the stop. *Florida*
 13 *v. Royer*, 560 U.S. 491, 500 (1983). However, it is objectively reasonable under the Fourth
 14 Amendment to check a motorist's driver's license and registration. *Id.* General questioning
 15 during a traffic stop concerning the starting point, destination and general travel plans are also
 16 objectively reasonable. *United States v. Chavez-Valenzuela*, 268 F.3d 719, 724 (9th Cir. 2001).

17 Mere police questioning does not constitute a seizure, and even when officers have no
 18 basis for suspecting a particular individual, they may generally ask questions of that individual,
 19 ask to examine the individual's identification, and request consent to search. *Muehler v. Mena*,
 20 544 U.S. 93 (2005). After *Muehler* was decided, the Ninth Circuit recognized that its prior
 21 decision in *United States v. Chavez-Valenzuela*, *supra*, had been overruled, in part, and that
 22 police are not required to have reasonable suspicion to ask questions beyond the scope of the
 23 initial traffic stop. *See United States v. Washington*, 490 F.3d 765, 770 (9th Cir. 2007); *United*
 24 *States v. Turbin*, 517 F.3d 1097, 1100 (9th Cir. 2008); *United States v. Mendez*, 476 F.3d 1077,
 25 1079-80 (9th Cir. 2007).

26 The court finds that the officers did not violate Diaz-Flores' Fourth Amendment rights by
 27 impermissibly expanding the duration and scope of the traffic stop. Diaz-Flores was detained for
 28 approximately twenty-two minutes before giving written consent to search at 17:39. During that

1 time, Diaz-Flores was asked for driver's license, registration, proof of insurance, and who owned
2 the vehicle. He was also asked about his starting point and destination. He produced a Mexican
3 driver's license and passport in his name. However, he gave conflicting information about his
4 starting point and destination. He initially told Mermini that he was coming from Amargosa, and
5 returning to Amargosa. He later stated he was coming from Amargosa and returning to South
6 Carolina after attempting unsuccessfully to sell the vehicle to his sister. He gave conflicting
7 stories about the vehicle itself. He initially told Mermini that the car belonged to a friend. When
8 asked the name of the friend, he could not provide it after a long delay. The paperwork for the
9 vehicle he eventually produced did not have his name on it. Diaz-Flores later said he had
10 recently bought the car. These statements made Trooper Mermini suspicious that the car might
11 be stolen.

12 Mermini and Munoz both testified that Diaz-Flores was extremely nervous throughout
13 the encounter. When Mermini first approached Diaz-Flores, he asked why he was so nervous.
14 Diaz-Flores claimed it was because he was in a fight with his wife. Mermini saw that Diaz-
15 Flores was on the phone with someone and asked him to call her back. Diaz-Flores was so
16 nervous that he left the driver's side door open, exposing it to oncoming traffic while retrieving
17 the paperwork. After receiving the passport, driver's license and paperwork for the vehicle,
18 Mermini went to the patrol car to initiate his investigation. This initial encounter took
19 approximately five minutes. Mermini called Task Force Officer Frampton and requested a K-9
20 Unit at 17:22 while he was in the patrol car to run a records check on Diaz-Flores and the
21 vehicle. He also called Task Force Detective Sandoval and is audibly heard on the recording
22 telling Sandoval "I've got a case." Whether or not Mermini believed he had reasonable
23 suspicion that Diaz-Flores was transporting drugs is not relevant to the issues before the court.
24 The Supreme Court has made it clear that an officer's subjective intentions play no role in
25 ordinary Fourth Amendment analysis, and are irrelevant to the court's inquiries concerning the
26 constitutionality of an investigatory detention. *Whren* at 811-13. The question before the court is
27 whether the duration and scope of the stop was objectively reasonable under the totality of the
28 circumstances. The court finds it was.

1 Mermini did not get the results from EPIC until 17:38. The two calls to Detectives
2 Frampton and Sandoval lasted less than two minutes and did not unreasonably delay the stop.
3 Diaz-Flores failed to produce insurance or registration for the vehicle. The paperwork for the
4 vehicle he provided did not have his name on it. He gave conflicting information about who
5 owned the vehicle, and eventually admitted to Munoz who conveyed the information to Mermini
6 that the vehicle had been “cold-plated”, that is, that Diaz-Flores had placed license plates from
7 his 1978 Camaro on the Chevy he was driving at the time of the stop because the Chevy was not
8 registered. As soon as Mermini learned the information EPIC reported that the vehicle was not
9 stolen, and that the plates on it belonged to a 1978 Camaro and that Diaz-Flores had been
10 previously deported, Mermini got out of his patrol car, handed the paperwork back to Diaz-
11 Flores and told him he was not going to be cited, but given a warning. The dash cam recording
12 confirms that Mermini got out of his patrol car at approximately 17:38. The court found
13 Mermini credible that it took a while to get the results of his records request from EPIC, and that
14 as soon as he received the EPIC report, he got out of the car to return the paperwork to Diaz-
15 Flores.

16 Mermini testified, and the dash-cam video confirms, that Mermini did not ask about
17 drugs or other contraband in the car until Diaz-Flores’ paperwork was returned to him. Mermini
18 testified, and the video recording confirms, that after Diaz-Flores denied he had any drugs or
19 contraband in the car, Mermini asked for consent to search. Diaz-Flores responded immediately
20 and without hesitation giving verbal consent. He did not express any reservations about the
21 request. Mermini then handed him a pre filled out consent to search form asking Diaz-Flores to
22 read it out loud. When Diaz-Flores did not begin reading the form, Mermini read it verbatim to
23 him. Diaz-Flores asked what the term “luggage” meant, and was told it meant “baggage.”
24 Mermini asked Diaz-Flores to sign *if* he consented to the search and Diaz-Flores signed it
25 without hesitation. The consent to search form was signed at approximately 17:39,
26 approximately one minute after Mermini got out of the patrol car, handed Diaz-Flores the
27 paperwork, and told him he was being given a warning and was free to go.
28

III. Consent

A search conducted without a warrant does not offend the Constitution “if conducted pursuant to the voluntary consent of a person in control of the premises.” *United States v. Kaplan*, 895 F.2d 618, 622 (9th Cir. 1990). It is the Government’s burden to demonstrate the consent to a warrantless search was voluntary. *Id.* Whether consent to search was voluntary and intelligent is a question of fact, and its resolution depends on the totality of the circumstances. *United States v. Brown*, 563 F.3d 410, 415 (9th Cir. 2009) (citing *Schneckloth v. Bustamont*, 412 U.S. 218, 227 (1973)). The Ninth Circuit considers the following five factors in determining whether a person has freely consented to a search: (1) whether the defendant was in custody; (2) whether the arresting officers had their guns drawn; (3) whether Miranda warnings were given; (4) whether the defendant was told that he had the right not to consent; and (5) whether the defendant was told that a search warrant could be obtained.” *Id.* When viewing the surrounding circumstances, however, there is no “mechanized formula to resolve the voluntariness inquiry,” and no one factor is dispositive. *United States v. Patayan Soraino*, 361 F.3d 494, 502 (9th Cir. 2004).

Applying these factors to this case, the court finds Diaz-Flores freely and voluntarily consented to the search. He was not in custody at the time he was verbally asked, agreed, and then consented in writing. The officers did not have their guns drawn at any point during the encounter. *Miranda* warnings were not given to him, but were not required. No suggestion was made by the officers that his arrest was imminent, or that the officers were even considering arresting him. The written form, which was read to Diaz-Flores verbatim, advised him that he had the right not to consent. After Mermini read the form to him, Mermini asked Diaz to sign *if* he consented to the search. At no point during the encounter was Diaz-Flores told that a search warrant could be obtained if he declined to consent.

The written motion claimed that the consent was not valid, among other reasons, because Diaz-Florez is not a native English speaker, and the form was in English. However, both officers testified that they communicated with Diaz-Flores throughout the encounter in English, and had no difficulty communicating with him. The court found their testimony credible in this regard.

1 The audio portions of the dash-cam video confirm that all of the conversation between Diaz-
2 Flores and Officer Mermini were in English, and none of the audio portions of the recordings
3 support a finding that Diaz-Flores had difficulty understanding or communicating in English.

4 Diaz-Flores also argues that his consent was tainted by a prior Fourth Amendment
5 violation. For Fourth Amendment purposes a determination that a consent is voluntary “only
6 satisfies a threshold requirement.” *United States v. George*, 883 F.2d 1407, 1415 (9th Cir. 1989).
7 A voluntary consent can be tainted by a prior Fourth Amendment violation. *United States v.*
8 *Furrow*, 229 F.3d 805, 813 (9th Cir. 2000) (citing *United States v. Delgadillo-Velasquez*, 856
9 F.2d 1292, 1299 (9th Cir. 1988)).

10 The court has found that the initial traffic stop was based on reasonable suspicion, and the
11 scope and duration of the stop comported with the Fourth Amendment under the totality of the
12 circumstances. It was objectively reasonable for Mermini to run a records check to determine
13 whether the vehicle had been stolen, and confirm Diaz-Flores identity and whether he had any
14 outstanding warrants.. As soon as Mermini confirmed the vehicle had not been reported stolen,
15 Diaz-Flores was given his paperwork, warned and told he was free to leave. No Fourth
16 Amendment violation tainted the verbal and written consent Diaz-Flores gave.

17 CONCLUSION

18 The traffic stop was supported by reasonable suspicion to believe that Diaz-Flores had
19 violated NRS 484B.127. The scope and duration of the stop were objectively reasonable under
20 the totality of the circumstances. The government has met its burden of establishing that Diaz-
21 Flores voluntarily consented to a search of the vehicle.

22 For the reasons stated,

23 **IT IS RECOMMENDED** that Defendant’s Motion to Suppress Evidence for Fourth
24 Amendment Violations (Dkt. #17) be **DENIED**.

25 Dated this 25th day of August, 2015.

26
27 
28 PEGGY A. LEEN
UNITED STATES MAGISTRATE JUDGE